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No. 86-765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MISSOURI PACIFIC RAILROAD COMPANY
and JOSEPH FALVEY,
Petitioners,

v.

C. RANDOLPH EVANS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The petitioners submit this brief in reply to the respondent's opposition to the petition for certiorari in this case.[1]

ARGUMENT

As shown in the petition for certiorari, the Eighth Circuit's ruling in this case creates a direct conflict among the Circuits over the availability of federal removal juris-

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[1] A statement of the corporate affiliations of petitioner Missouri Pacific Railroad Company, in accordance with Rule 28.1, is set forth in the petition for certiorari.

diction in cases involving "minor disputes" under the Railway Labor Act. In opposing the petition, the respondent relies principally on one proposition: that this case does not involve a minor dispute under the RLA and that, as a consequence, the Eighth Circuit's decision can be distinguished from the decisions of other Courts of Appeals in which purported state-law claims involving minor disputes have been held to be removable to federal court.

This response is misconceived for two reasons. First, the Eighth Circuit's decision does not rest on the absence of a minor dispute here, nor is it confined to cases in which minor disputes are absent. Instead, the Eighth Circuit has held that removal jurisdiction is unavailable *regardless* of whether a railroad or airline employee's claim involves a minor dispute, a holding that places the Eighth Circuit squarely in conflict with four other Courts of Appeals. See pp. 2-4 *infra*. Second, it is abundantly clear that the respondent's claim in this case does involve a minor dispute, as the district court found and as numerous other courts faced with similar claims have squarely held. See pp. 4-8 *infra*. As a result, neither the Eighth Circuit's reasoning nor the claims underlying this case can reconcile the Eighth Circuit's decision with the contrary Court of Appeals decisions cited in the petition for certiorari. In addition, the respondent has not taken issue with the petitioners' showing that the issues in this case are closely related to those presented by several other cases now pending for decision before this Court.

I. T heEighth Circuit's Decision Forecloses Removal Jurisdiction In Class Involving Minor Disputes Under The Railway Labor Act

Contrary to the respondent's apparent belief, the question presented by the Eighth Circuit's decision is not whether the respondent's claims involve a minor dispute and hence are preempted under the RLA. The respondent never asked the Eighth Circuit to rule that his claims fell

outside the RLA's minor-dispute provisions, and the Eighth Circuit never discussed that question. See 795 F.2d 57, 57-58 (8th Cir. 1986) (Pet. App. 1a-4a). The Eighth Circuit thus left undisturbed the holding of the district court that the respondent's claims do involve a minor dispute. See 795 F.2d at 58 (Pet. App. 4a); 618 F.2d 930, 931-32 (E.D. Mo. 1985) (Pet. App. 7a-10a). Instead of holding that the respondent's claims were outside the preemptive scope of the RLA, the Eighth Circuit reversed the district court solely on the ground that the respondent had framed his complaint as a state tort claim and that "the federal preemption defense in response to a state law claim is not a ground for removal." 795 F.2d at 58 (Pet. App. 4a).

In light of this ruling, the question presented here is not whether a particular claim by a railroad employee falls within the preemptive scope of the RLA, but instead whether, if the claim *does* fall within the RLA's preemptive scope, the claim comes within the federal courts' removal jurisdiction under *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), and *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). By leaving the district court's preemption holding intact and reasoning simply that "the federal preemption defense * * * is not a ground for removal," the Eighth Circuit held that it does not. In contrast, as set forth in detail in the petition for certiorari, the Fourth, Sixth, Seventh, and Ninth Circuits have held that it does. See Pet. 8-10. These Circuits have squarely rejected the Eighth Circuit's unqualified rule that federal preemption is not a ground for removal. See, *e.g.*, *Graf* v. *Elgin, Joliet & Eastern Ry. Co.*, 790 F.2d 1341, 1344 (7th Cir. 1986) ("To conclude * * * that preemption never affects the nature of the plaintiff's claim would be inconsistent with the rule that a plaintiff cannot by 'artful pleading' prevent the removal of a claim that is really federal * * *."). Because the Eighth Circuit rested its decision on the ground that federal preemption does not support removal jurisdiction, rather than on a ruling

that the respondent's claims are not preempted, the respondent cannot distinguish the Eighth Circuit's decision from the other Court of Appeals decisions on the theory that those decisions involve minor disputes and this decision does not.

II. The Respondent's Claims Against The Petitioners Involve A Minor Dispute Within The Preemptive Scope Of The Railway Labor Act

Because the Eighth Circuit's removal decision does not turn on whether the respondent's claims come within the scope of the RLA's minor-dispute provisions, there is no need for this Court to determine whether those claims involve a minor dispute. It can be demonstrated in short order, however, that the respondent's claims do present a minor dispute. As a result, there are no material differences between the facts of this case and the facts underlying the Court of Appeals removal decisions relied on by the petitioners; the only difference is the result reached by the Eighth Circuit.

The gravamen of the respondent's claim in this case is that one of his supervisors, "in the course of employment procedures for the purpose of determining the personnel that would occupy * * * positions" under the collective bargaining agreement, made libelous statements about him. Complaint ¶¶ 4-6 (Pet. App. 18a). Federal and state courts have held repeatedly that defamation claims of this kind, arising in a variety of employment contexts, involve minor disputes and therefore are preempted by the RLA. See *Majors* v. *U.S. Air, Inc.*, 525 F. Supp. 853 (D. Md. 1981); *Carson* v. *Southern Ry. Co.*, 494 F. Supp. 1104 (D.S.C. 1979); *Miller* v. *United Airlines, Inc.*, 220 Cal. Rptr, 684 (Ct. App. 1985); *Louisville & Nashville R. Co.* v. *Marshall*, 586 S.W.2d 274 (Ky. Ct. App. 1979); *Barchers* v. *Missouri Pacific R. Co.*, 669 S.W.2d 235 (Mo. Ct. App. 1984); *Alsbury* v. *Missouri Pacific R. Co.*, 670 S.W.2d 87 (Mo. Ct. App. 1984); see also *Macy* v. *Trans World Airlines, Inc.*, 381

F. Supp. 142 (D. Md. 1974).[2] These courts have held that the employee must look for relief to the remedial scheme created by the RLA for handling minor disputes. The preemption holding of the district court in this case, which was not disturbed by the Eighth Circuit, is thus only the most recent in a long line of authority.[3]

These decisions follow directly from the decisions of this Court and other courts recognizing the broad scope of minor disputes under the RLA. Minor disputes are not confined, as the respondent suggests, to disputes that rest directly on contractual claims under the collective bargaining agreement. To the contrary, the minor-dispute provisions of the RLA expressly apply not only

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[2] In some of these cases, such as the Kentucky Court of Appeals' decision in *Marshall* and this case, the allegedly defamatory statements were made in connection with proceedings to determine an employee's eligibility for a job position. See *Marshall*, 586 S.W.2d at 276-82 (review of eligibility for more senior position). In others, the statements occurred in connection with a disciplinary proceeding or investigation. See, *e.g.*, *Majors*, 525 F. Supp. at 854-55 (investigation of theft). In still others, the statements were made in connection with the handling of an employee's grievance against his employer. See, *e.g.*, *Barchers*, 669 S.W.2d at 236-37 (grievance concerning dismissal). Regardless of the particular setting, the courts have held that the statements were directly intertwined with the administration of the parties' rights under the collective bargaining agreement and therefore necessarily involved minor disputes under the RLA. See, *e.g.*, *Barchers*, 669 S.W.2d at 237-38. As shown by cases like *Marshall*, which involved a libel action by a railroad employee who was denied a promotion because of negative comments about him by a supervisor, this case cannot be distinguished simply because the alleged libel did not occur in a disciplinary hearing or a grievance proceeding.

[3] We are aware of only one case in which a court has permitted a defamation claim by a railroad or airline employee against his employer to go forward in the face of an RLA preemption argument, and the California Supreme Court has granted a petition to review that decision. See *DeTomaso* v. *Pan American World Airways, Inc.*, 220 Cal. Rptr. 493 (Ct. App. 1985), *review granted*, 714 P.2d 1239 (1986).

to disputes regarding "the interpretation or application of [collective bargaining agreements]" but to all "grievances" as well. 45 U.S.C. § 153 First (i). This Court recognized over 40 years ago, in *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U.S. 711 (1945), that minor disputes thus include claims "founded upon some incident of the employment relation * * * *independent* of those covered by the collective [bargaining] agreement." 325 U.S. at 723 (emphasis added); accord, *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 551-52 (1959) ("[t]he purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated"). In the words of the Ninth Circuit in *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978), the most commonly cited Court of Appeals decision on the subject, minor disputes embrace all claims that are " 'arguably' governed by the collective bargaining agreement or ha[ve] a 'not obviously insubstantial' relationship with the labor contract." 576 F.2d at 1369-70. Here, where the respondent's claim arises directly out of the conduct of an employment hearing regarding his seniority rights under the collective bargaining agreement, the relationship between the claim and the parties' contractual relationship is far more than "not obviously insubstantial."

It has been clear at least since this Court's decision in *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), that the mere fact that a railroad or airline employee's claim is framed in terms of tort rather than contract does not affect its status as a minor dispute. See Pet. 4, 11. It is thus of no moment that the respondent has crafted his complaint about the conduct of the employment hearing as a tort action rather than a contractual grievance. In four of the Court of Appeals decisions involved here, the plaintiffs sought to evade the RLA's minor-dispute remedial mechanisms by framing their claims as torts, and in each case the Court of Ap-

peals nonetheless recognized the claims to be minor disputes.[4] The conflict between these cases and the Eighth Circuit's decision thus cannot be explained away on the ground that this case involves claims sounding in tort.

Neither can the conflict be explained away, as the respondent attempts to do, on the ground that this case does not involve an act of discharge or discipline. The precedents make it abundantly clear that minor disputes encompass the full range of claims arising out of the employment relation between railroads and airlines and their employees, from discipline to job assignments to working conditions and benefits.[5] Indeed, as the defamation cases cited above illustrate, minor disputes have been held specifically to include claims involving false statements made in connection with the administration of the collective bargaining agreement. As a result, the respondent's cause is not advanced by the fact that some of the Court of Apepals decisions relied on by the petitioners involve discharge or other disciplinary actions. Federal removal jurisdiction was upheld in those cases because the employees' claims came within the scope of

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[4] See *Schroeder* v. *Trans World Airlines, Inc.*, 702 F.2d 189, 190-91 (9th Cir. 1983); *Magnuson*, 576 F.2d at 1368-69; *Graf*, 790 F.2d at 1345; *Adkins* v. *Chesapeake & Ohio Ry. Co.*, 122 L.R.R.M. 2368 (4th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3463 (U.S. Dec. 24, 1985) (No. 85-1099).

[5] See, *e.g.*, *Southern Pacific Transp. Co.* v. *IBEW*, 474 F.2d 696 (9th Cir.), *cert. dismissed*, 411 U.S. 923 (1973) (work assignments); *De La Rosa Sanchez* v. *Eastern Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978) (pension benefits); *Chicago & North Western Transp. Co.* v. *UTU*, 656 F.2d 274 (7th Cir. 1981) (meal privileges); *Sisco* v. *Consolidated Rail Corp.*, 732 F.2d 1188 (3d Cir. 1984) (seniority rights); *Brotherhood Railway Carmen* v. *Norfolk & Western Ry. Co.*, 745 F.2d 370 (6th Cir. 1984) (compensation). In fact, one of the very cases that gives rise to the present conflict—*McKinney* v. *International Ass'n of Machinists and Aerospace Workers*, 624 F.2d 745 (6th Cir. 1980)—concerns a dispute arising out of promotion decisions rather than one relating to discharge or discipline. See 624 F.2d at 747.

the RLA's minor-dispute provisions; nothing turns on the particular kind of minor dispute involved.

III. The Respondent Has Not Disputed The Relationship Between This Case And Other Cases Currently Pending Before The Court

The petitioners have shown in their prior papers that the issues presented by this case are closely related to those in several cases before the Court for decision this Term, including *Caterpillar Inc.* v. *Williams*, No. 86-526 (cert. granted Nov. 17, 1986), and *Metropolitan Life Ins. Co.* v. *Taylor* and *General Motors Corp.* v. *Taylor*, Nos. 85-686 and 85-688 (cert. granted Feb. 24, 1986). See Pet. 19-22; Petrs. Supp. Brief 1-4. We add here only that the respondent has made no attempt to take issue with the petitioners on this score. For the reasons already set forth, review of this case would provide an important complement to review in those cases, and even if plenary review were considered unwarranted, the pendency of those cases makes it appropriate to hold this case pending their disposition.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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